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17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA

19 SAN FRANCISCO DIVISION

20 WAYMO LLC,

21 Plaintiff,

v.

22 UBER TECHNOLOGIES, INC.;
23 OTTOMOTTO LLC; OTTO TRUCKING
24 LLC,

25 Defendants.

26 CASE NO. 3:17-cv-00939-WHA

27 **PLAINTIFF WAYMO'S OPPOSITION TO
28 NON-PARTY ANTHONY
LEVANDOWSKI'S MOTION FOR
INTERVENTION UNDER RULE 24(b)**

Hearing:

Date: May 24, 2017

Time: 2:00 p.m.

Place: Courtroom F, 15th Floor

Judge: The Honorable Jacqueline Scott Corley

1 Plaintiff Waymo LLC (“Waymo”) respectfully opposes Mr. Levandowski’s motion for
 2 intervention. Mr. Levandowski’s request is pursuant to Federal Rule of Civil Procedure
 3 24(b)(1)(B), which provides the district court discretion to permit intervention by a party having
 4 “a claim or defense that shares with the main action a common question of law or fact.” In
 5 exercising its discretion, the court should “consider whether intervention will unduly delay the
 6 main action or will unfairly prejudice the existing parties.” *Donnelly v. Glickman*, 159 F.3d 405,
 7 412 (9th Cir. 1988) (upholding denial of permissive intervention where “allowing intervention
 8 would only serve to undermine the efficiency of the litigation process” (quotation omitted)). The
 9 court does not abuse its discretion in denying or limiting permissive intervention where the
 10 positions of the purported intervenors are adequately represented by another party. *See Dep’t of
 11 Fair Employment & Housing v. Lucent Techs. Inc.*, 642 F.3d 728, 742 (9th Cir. 2011). A court
 12 may also properly deny intervention where the would-be intervenor has “no new evidence or
 13 arguments to introduce into the case.” *Perry v. Schwarzenegger*, 630 F.3d 898, 906 (9th Cir.
 14 2011) (per curiam).

15 Here, Mr. Levandowski seeks permissive intervention for the sole purpose of “oppos[ing]
 16 Waymo’s motion seeking compelled production of materials subject to a joint defense agreement
 17 to which Mr. Levandowski is a party” (Mot. at 4.) However, the Defendants in this case, co-
 18 members of Mr. Levandowski’s purported joint defense group, are already vigorously contesting
 19 the production of these materials based on the same common interest privilege that Mr.
 20 Levandowski seeks to assert. (*See* Defs’ Opp. to Mot. to Compel (Dkt. 369).) This renders this
 21 case distinguishable from Mr. Levandowski’s cited authority *Convertino v. United States DOJ*,
 22 674 F. Supp. 2d 97 (D.D.C. 2009), where the intervenor was seeking to vindicate privileges that
 23 were not being asserted by any party in interest to the action. *Id.* at 108.

24 In fact, in his “Joinder” to Defendants’ Opposition, Mr. Levandowski expressly admits that
 25 he has no additional or unique facts or arguments to add to this issue, but rather that he is
 26 “rel[y]ing on the points and authorities set forth in Uber’s memorandum” (Dkt. 384.) Thus,
 27 although Judge Alsup’s April 25 Order does contemplate that “Defendants and Levandowski” will
 28

1 file an Opposition to Defendants' motion (Dkt. 382), Mr. Levandowski should not be permitted to
 2 intervene just to incorporate by reference and rehash Defendants' arguments.

3 This is especially true where Mr. Levandowski is not seeking intervention to protect his
 4 Fifth Amendment rights against self-incrimination. Nor could he. This Court has already rejected
 5 the notion that Mr. Levandowski can use his *personal* right against self-incrimination to withhold
 6 information or documents within the possession, custody, or control of *Defendants* (Dkt. 202 at 7-
 7 8, *examining Fisher v. United States*, 425 U.S. 391, 402 (1976)). And Mr. Levandowski's request
 8 for a writ of mandamus on that issue was denied. (*See* USCA Fed. Cir. Case No. 2017-1904).

9 Mr. Levandowski's motion to intervene now is especially inappropriate given that he
 10 previously refused to testify regarding both the alleged common interest and the "due diligence"
 11 materials sought to be discovered by Waymo. For example, Mr. Levandowski asserted his Fifth
 12 Amendment rights and refused to testify as to when the alleged common interest between him and
 13 Defendants was formed. (Dkt. 366-8, Levandowski Depo. Tr. at 37:7-38:3, 34:3-35:13.) Mr.
 14 Levandowski also asserted the Fifth Amendment and refused to testify about the factual
 15 circumstances underlying the "due diligence" report that is at the center of this dispute. (*Id.* at
 16 43:11-17.) And in response to questions regarding the nature of his alleged common interest with
 17 Defendants, Mr. Levandowski was instructed not to answer on the nonsensical grounds that such
 18 information about the contours of the asserted privilege was itself privileged. (*Id.* at 33:16-23,
 19 35:14-37:6, 38:4-43:7.) Mr. Levandowski should not be permitted to first thwart discovery into
 20 the circumstances of the alleged common interest and to then make arguments in opposition to
 21 Waymo's motion. *See Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 910 (9th Cir. 2008)
 22 (affirming district court's preclusion of defendant's testimony at trial based on defendant's earlier
 23 invocation of Fifth Amendment privilege during deposition).

24 For these reasons, Waymo respectfully requests that the Court DENY Mr. Levandowski's
 25 request for intervention under Fed. R. Civ. P. 24(b).

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DATED: May 16, 2017

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